HOTEL AMBASSADOR (M) SDN. BHD.

v.

SEAPOWER (M) SDN. BHD.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 22-202-90]
8 SEPTEMBER 1990

LAND LAW: *Tenancy - Non renewal of option clause after expiry of original lease - Monthly rental - Tenancy less than 3 years - Differences in registration requirements under former and present Codes - Effect of non-registration - Unprotected - Not binding on subsequent purchaser - Sections 213(3), 221(4), 222(4), 223(2), 227(1), 267(2)(3), 316(1) of the National Land Code 1965.*

The defendants S (the registered proprietors) had purchased certain immovable property on which stands the Ambassador Hotel (the disputed property) at a public auction on 26 July 1989 pursuant to an order for sale dated 14 August 1986 made by the High Court upon the application of the chargee M. Since 22 March 1966, the plaintiffs H had carried on the business of hoteliers at the disputed property, being in occupation pursuant to a registered lease for 10 years granted to them by A, the previous owners. The order for sale contained conditions in relation to existing tenancies (Clause 8), and the purchaser's rights on payment of balance of purchase price (Clause 12). Although H continued to be in occupation after expiration of the 10 years, they had failed to exercise the option either in the manner or within the time specified in the lease or at all.

Under O. 89, Rules of the High Court 1980 (RHC) S commenced proceedings against H for possession of the disputed property. It was held that as H were tenants holding over after termination of their tenancy, the summary procedure under O. 89 did not apply.

H then issued a writ against S claiming declarations that they were the lawful tenants of the disputed property and damages; H had also successfully obtained an *ex parte* interlocutory injunction against S from interfering with their occupation. S then applied for similar declarations against H and for discharge of the existing injunction.

The issue for the Court was whether H were in occupation of the disputed property as tenants or as trespassers. Observations on the differences between the former Land Code (LC) and the present National Land Code (NLC) in relation to tenancies.

Held:

[1] Since H had not, after the expiry of their lease, taken the precaution of protecting their short tenancy of less than 3 years by registration as provided in s. 316(1) of the NLC, H's tenancy was not binding on S; in addition, the tenancy will not bind S unless it has become protected by endorsement prior to the date of the registration of the charge - see s. 267(3) of NLC.

[2] Clauses 8 and 12 are only applicable to tenancies binding on purchasers; also, any attempt to contract out of clear statutory provisions would be void and wholly ineffective as being contrary to public policy.

[3] H had been given ample notice before action was commenced; as such H are trespassers or at most bare licensees.

[4] The *ratio decidendi* of the judgment in the first set of proceedings by S against H was limited to the proposition that as S were tenants holding over after termination of their tenancy the summary procedure under O. 89 was not applicable. All other observations made by the Judge were of necessity, *obiter dicta*.

[5] There can be no defence of estoppel based on the judgment of the trial Judge in the earlier proceedings as there cannot be estoppel against a statute.

[Judgment for the defendants.]

Cases referred to:
Quinn v. Leathem [1901] AC 495
Yeap Yok Tee v. Lee Boon Bee [1973] 1 MLJ 3
Tool Manufacturing Co. v. Tungsten Electric Co. [1955] 2 All ER 657
Mst. Kauleshwari Kuer v. Surajnath Rai [1957] AIR Pat 456
Hatten v. Harris [1892] AC 560

Legislation referred to:
National Land Code 1965, ss. 213(3), 221(4), 222(4), 227(1), 223(2), 228(1)(a), 256(3), 267(2), 267(3), 316(1)
Rules of the High Court 1980, O. 89 r. 1
Land Code (Cap 138), ss. 42(r), 125(i), 116, 118

Others sources referred to:
Hill and Redman on Landlord and Tenant, 16th Edn., p. 162
Atkins Court Forms, 2nd Edn., Vol. 24, p. 188
Tenure and Land Dealings in the Malay States by Dr. David Wong, p. 454

For the plaintiff - S.P. Annamalai; M/s. Annamalai & Co.
For the defendant - V.M. Mohan; M/s. V.M. Mohan & Co.

JUDGMENT

Edgar Joseph Jr J:

This case raises the interesting question of the relationship between purchasers of immovable property at a public auction held pursuant to an order of Court made under s. 256(3) of the National Land Code 1965 ("the Code") and persons in occupation who claim to be tenants thereof.

The history of the matter which calls for the consideration of the Court may be stated shortly.

The defendants ("the purchasers") had purchased certain immovable property situated at Penang Road, George Town on which stands the Ambassador Hotel ("the disputed property") at a public auction held on 26 July 1989, pursuant to an order for sale dated 14 August 1986 made by the High Court under the provisions of the Code upon the application of the chargees Malayan United Finance Berhad, by Originating Summons No. 777/85. Upon the purchasers paying the whole of the purchase price of RM6,000,000 the certificate of sale in Form 16F was issued by the Senior Assisant Registrar on 8 December 1989 and, consequent thereto, the purchasers became the registered proprietors of the disputed property.

The proclamation of sale issued pursuant to the order for sale contained, *inter alia*, the following conditions of sale:

> 8. The properties are sold subject to all existing tenancies, if any, and all claims of tenants and occupiers by contract, custom statute or otherwise.

12. Upon payment of the balance of the purchase money the purchaser shall be let into possession or the receipt of the rents and profits of the properties.

Since 22 March 1966 the plaintiffs ("the occupants") had been carrying on the business of hoteliers at the disputed property under the name or style of the Ambassador Hotel, they having gone into possession pursuant to a lease in writing duly registered under the Code and bearing Presentation No. 472, lease Vol. 1, Folio 39 granted to them by the previous owners Saw Consolidated Securities Sdn. Bhd. ("the previous owners").

The lease was for a term of 10 years at a monthly rental of RM11,000 per month. By Clause 4(e) of the annexure to the lease, the occupants had the option to renew the lease for 10 years at a monthly rental of RM12,000 and, thereafter, for a further term of 10 years at a monthly rental of RM13,000.

Now, the option for renewal clause in the lease, provided, *inter alia*, that if the lessees were desirous of continuing the tenancy thereby created for a further term of ten (10) years at the expiration of the term thereby granted, they had, six (6) months before the expiry of the tenancy thereby created, to give to the lessors notice in writing of their desire. It was not disputed that the occupants although they continued to be in occupation after expiry of the initial term of 10 years, to the present day, had failed to exercise the option either in the manner or within the time specified in the lease or at all and that consequently a condition precedent for renewal had not been fulfilled.

There is authority for saying that a lessee desirous of exercising an option to renew must conform with the conditions in the lease as to its exercise. (See *Hill and Redman on Landlord and Tenant* 16th Edn., p. 162). I also note that the footnote (b) to p. 188, *Atkins Court Forms*, 2nd Edn., Vol. 24 reads: "Most options to renew require the lessee to serve notice of exercise within a specific time. This and other conditions are construed strictly against the lessee."

Moreover, s. 228(1)(a) of the Code provides explicitly that the lessee must exercise the option to renew the lease **before** the expiry of the term. Clearly, the occupants in this case had not even complied with that requirement.

It cannot be gainsaid however that upon expiry of the initial terms of 10 years the previous owners and the occupants had agreed to continue the relationship of landlord and tenant presumably on the basis of a monthly tenancy since rent was payable with reference to the month. Support for this view may be derived from the fact that the previous owners had issued a writ against the occupants, being Civil Suit No. 287/89, for the recovery of arrears of rent in respect of the period February 1984 to May 1989, amounting to RM756,000 and for vacant possession. On 3 March 1990, the previous owners obtained judgment for the said sum of RM756,000 but abandoned the claim for possession which was understandable as by then ownership of the disputed property had passed to the purchasers. However, the previous owners found it necessary to levy execution on the judgment debt which they did by way of a writ of seizure and sale and the Court bailiff had taken possession of the disputed property and placed security guards to prevent entry and exit therefrom, but happily this ended in a settlement.

On 16 February 1990 the purchasers issued Originating Summons No. 113/90 claiming against the occupants possession of the disputed property under O. 89 of the Rules of the High Court 1980.

After hearing argument, my brother Wan Adnan held that as the occupants were tenants holding over after termination of their tenancy, the summary procedure under O. 89 did not apply.

Order 89 rule 1 is as follows:

> Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this order.

Every judgment must be read as applicable to the particular facts proved, since the generality of expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found (per Lord Halsbury in *Quinn v. Leathem* [1901] AC 495, HL at p. 506).

In my opinion, the *ratio decidendi* of the judgment of Wan Adnan J was limited to the proposition that as the occupants were tenants holdings over after termination of their tenancy the summary procedure under O. r. 89 was not applicable and nothing more. All other observations made by him were thus of necessity, *obiter dicta*, as Counsel for the occupants rightly recognised.

The purchasers did however appeal against that decision but later withdrew it.

The occupants then took the initiative by causing to be issued the writ herein against the purchasers claiming:

(a) a declaration that they are the lawful tenants of the disputed property.

(b) an order that the purchasers and/or their agents, servants or whomsoever be restrained from interfering with or disturbing their lawful and actual possession and use of the disputed property and such injunction as may be just or necessary.

(c) damages.

At the same time, the occupants had on 29 May 1990 successfully applied *ex parte* for an interlocutory injunction that the purchasers be restrained whether by themselves or by their agents, servants and whomsoever from interfering with or disturbing their occupation and use of the disputed property in any manner whatsoever until further order; an order that the purchasers do remove the security guards placed at the lobby of the aforesaid Hotel Ambassador forthwith and also deliver over forthwith all keys to the main door at the ground floor thereof which the purchasers had changed and replaced after 5 p.m. on 28 May 1990 and such further or other order as may be necessary.

The purchasers then applied *inter partes* for, *inter alia*, (a) a declaration that possession of the disputed property be delivered to them, (b) that the injunction aforesaid be discharged, (c) that an injunction be granted restraining the occupants, their servants or agents from interfering with the purchasers' peaceful possession of the disputed property, and (d) damages.

Before me, Counsel for the occupants in his summary of submissions in reply dated 18 June 1990, had stated that the primary facts appearing in the chronology of events were not in dispute and that all the Court had to do was to apply the law to those facts in order to determine whether the occupants were in occupation of the disputed property as tenants or as trespassers. I therefore approached the issues which arose for decision upon the application before me on that basis.

It cannot be disputed that upon expiry of the lease on 20 March 1976, as against the previous owners, the occupants were tenants from month to month because, as I have already observed, the occupants did not exercise the option for renewal either within the time or in the manner prescribed by the lease or at all, but merely continued in occupation paying rents with reference to the month.

Now, the Code provides that any lease or sublease for a term exceeding three years may only be created by registration. (Sections 221(4), 222(4), 227(1)). A lease or a sublease for a term not exceeding three years which is called a "tenancy exempt from registration" is exempt from registration and may be created orally or by a written instrument in any form whatsoever. (Section 223(2)). In contrast, under the FMS Land Code, Cap. 138, ("the former Land Code") the immediate predecessor of the Code, only tenancies for a term not exceeding one year could be created without registration and all leases or subleases for a longer term had to be created by registration. (Sections 116, 118, and 125(i) thereof.)

Another difference between the former Land Code and the Code, which is relevant to the present case, is that whereas formerly, a tenancy exempt from registration had the status of an overriding interest which required no protection against subsequent dealings (s. 42(v) thereof and the case of *Yeap Yok Tee v. Lee Boon Bee* [1973] 1 MLJ 3), the present Code cancelled out this exception and although it exempts all short tenancies not exceeding three years from registration, all such tenancies are required to be protected by way of an endorsement in the register document of title otherwise an unprotected tenancy will not bind the holder of an indefeasible title or interest. This is provided for by s. 213(3) of the present Code which, omitting immaterial parts, states:

> ...no tenancy exempt from registration granted after the commencement of this Act shall be binding on:
>
> (a) any person or body to whom the grantor subsequently transfers the reversion expectant thereon, or to whom he subsequently grants any lease, sub-lease, tenancy or charge, or in whose favour any lien over that reversion is subsequently created; or
>
> (b) any person or body claiming through or under such a person or body,
>
> unless, prior to the date on which the dealing referred to in para. (a) takes effect, the tenancy has become protected by an endorsement on the register document of title to the land pursuant to Chapter 7 of Part Eighteen.

As Dr. David Wong says in his book *Tenure and Land Dealings in the Malay States*, at p. 454 after reproducing s. 213(3):

> Thus unless so protected, a tenancy exempt from registration, granted after the commencement of the present Code will be defeated not only by a subsequent registered dealing but also by a subsequent statutory lien and even a subsequent tenancy both the latter being non-registrable.

In the present case, it was common ground that the occupants had not, after expiry of their lease, taken the precaution of protecting their short tenancy of less than three years, by endorsement in the register document of title as provided for in s. 316(1). The effect of this omission was to defeat the occupants' tenancy, or in other words, their tenancy was not binding on the purchasers.

As for any tenancy exempt from registration granted by the chargor **after** the date of registration of the charge concerned, and even with the consent of the chargee, it will not bind the purchaser unless it has become protected by an endorsement under s. 316(1) of the Code **prior** to the date of registration of the certificate of sale. (See s. 267(2)). As for any

tenancy exempt from registration granted by the chargor **before** the registration of the chargee concerned - as in the present case, since the occupants' lease expired on 21 March 1976, after which they held over as monthly tenants and the charge was registered on 15 May 1982 - it will not bind the purchaser unless it has become protected by endorsement **prior** to the date of registration of the charge. (See s. 267(3)).

It makes no difference that condition 8 of the proclamation of sale provides that the disputed property was sold subject to all existing tenancies, if any, and all claims of tenants and occupiers by contract, custom, statute or otherwise. This condition must be understood to refer only to tenancies binding on the purchasers. Short tenancies of less than three years not protected by endorsement under s. 316(1) of the Code, are not binding on the purchasers, and are obviously excluded from the contemplation of condition 8. In any event, any attempt to contract out of clear statutory provisions aforesaid would be void and wholly ineffective as being contrary to public policy. Condition 12 must be read in the same light.

The purchasers are therefore entitled to possession as the occupants are in unlawful possession of the disputed property i.e they are trespassers or, at most, bare licensees and, on the evidence, had been given ample notice before action. Furthermore, service of the summons in chambers herein was itself a notice of termination of the license. (See *Tool Manufacturing Co. v. Tungsten Electric Co.* [1955] 2 All ER 657). Indeed, prior to the issue of the summons in chambers, the occupants have had notice when the purchasers' former solicitors served them with a notice to quit dated 20 November 1989 requiring them to deliver vacant possession within 14 days from date of receipt thereof, which is more than sufficient to a bare licensee.

The defence of estoppel based on the judgment of Wan Adnan J aforesaid, cannot arise since there can be no estoppel against a statute; specifically, the various provisions of the Code to which I have referred. So, for example, there can be no estoppel from questioning the validity of document which is required by law to be registered and is not registered. (See *Mst. Kauleshwarikuer v. Surajnath Rai* AIR [1957] Pat. 456).

Accordingly, I discharged the interlocutory injunction dated 29 May 1990 made in favour of the occupants and granted the declaration for vacant possession prayed for by the purchasers. Upon the purchasers going into possession of the disputed property the occupants were to be restrained from interfering with the purchasers' peaceful possession thereof. Damages were to be assessed and paid by the occupants upon enquiry by the Senior Assistant Registrar and the purchasers were to have the costs of the proceedings.

Subsequently, after extraction of my order aforesaid, Counsel appeared before me, and after hearing argument, I had, in the exercise of my powers under the Slip Rule, varied the declaratory order aforesaid, so as to require the occupants to deliver vacant possession forthwith to the purchasers. Apart from the Slip Rule, the Court has an inherent power to vary its own orders so as to bring it into harmony with the order which it obviously meant to pronounce (per Lord Watson in *Hatten v. Harris* [1892] AC 560). A mere declaratory order would not have conveyed the intention of the Court.

Lastly, for the avoidance of doubt, I ordered that such damages as are found by the Senior Assistant Registrar to be payable by the occupants shall be paid to the purchasers.

Also found at [1990] 2 CLJ 1044